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ABSTRACT

This speech responds to arguments for reform or abolition of teacher tenure acts. The author argues that, inadequate as tenure laws may be, they provide in many States the most practical safeguard against managerial caprice in the educational establishment. Court cases that uphold or prove the value of teacher tenure laws are presented. A related document is EA 003 963. (JF)

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1

WHY I OPPOSE ABOLITION OF TEACHER TENURE ACTS

ERWIN B. ELLMANN\*

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It is easy to be seduced by the blandishments of that smiling Irishman, Tom Shannon, who has eloquently urged abolition of teacher tenure acts. I find myself, however, in the camp of the melancholy Dane who, you recall, counselled that it is better to "bear those ills we have than fly to others that we know not of". Inadequate as the tenure acts may be, disappointing as has been their administration, and constitutionally dubious as may be some of their procedures, they yet provide in many states the most practical safeguard against managerial caprice in the public education establishment. Unless and until better techniques are devised, put into operation, and shown to be effective, tenure legislation remains desirable, if not indispensable to provide teachers a minimum of job security.

Assuming that the Supreme Court of Minnesota accurately chronicled educational history in McSherry v. City of St. Paul, 202 Minn 102, 106, 277 NW 541 (1938), a committee of the NEA in

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Assuming that the Supreme Court of Minnesota accurately chronicled educational history in McSherry v. City of St. Paul, 202 Minn 102, 106, 277 NW 541 (1938), a committee of the NEA in 1885 suggested that the principles of civil service be applied to the teaching profession so that it would be independent of personal or political influence and "made free from the malignant power of spoils and patronage". The next year, Massachusetts passed a teacher tenure act and thereafter many states followed this example. The theory of the statutes, as the Minnesota Court observed, was that this legislation was "enacted for the benefit

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and advantage of the school system by providing such machinery as would tend to minimize the part that malice, political or partisan trends, or caprice might play. It established merit as the essential basis for the right of permanent employment". (p 108, emphasis in original).

The Louisiana tenure act, the Appeals Court of that State noted in Andrews v. Union Parish School Board, 184 So 574, 578 (La App 1938), affirmed, 191 La 90, 184 So 552 (1938), had as its object the laudable purpose of protecting "the worthy instructors of the youth of a parish from enforced yielding to the political preferences of those theretofore having the power to grant or withhold employment to them". It was "to vouchsafe to such teachers employment, after a long term of satisfactory service to the public, regardless of the vicissitudes of politics or the likes or dislikes of those charged with the administration of school affairs".

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Notwithstanding the convictions of some that the world is getting better, I submit that the need for such protection of teachers has in no way abated. In Arkansas only a few weeks ago, a school board refused to renew the teaching contract of a teacher with 25 years of outstanding experience. Over a period of three school years she had allowed a second grade student in her class to write a letter to the supervisor of the school cafeteria urging him to serve raw carrots rather than cooked carrots because the authorized school texts indicated the added nutritional values of carrots spared the ministrations of school lunchroom Escoffiers. Another time, when a water fountain in her room was broken and the temporary water supply provided by the teacher at her own expense for her pupils was exhausted, this educator had the temerity to ask pupils in her art class to draw pictures illustrating the human condition and the quality of life in that

second grade classroom. Some of the pupils cartooned their parched fellows lying down and asking for water as flowers wilted in the background. These illustrations were suffered to reach the hands of the principal. Finally, as a culmination to this catalog of high crimes and misdemeanors, the teacher had on another occasion written to other teachers asking whether they objected to the effusions from an open burning incinerator in the middle of the playground. It was necessary for the teacher to involve a federal judge before she was able to get back her job. Downs v. Conway School District, 328 Fed Supp 338, (ED Ark, June 23, 1971). The court found that the superintendent demanded blind obedience to any directive he gave, whether illegal, arbitrary or capricious, and that he and the board should observe its own declared policy of permitting teachers to practice and illustrate democratic values in the classroom. Reinstatement with back pay and attorney fees were ordered. While incidents such as this

second grade classroom. Some of the pupils cartooned their parched fellows lying down and asking for water as flowers wilted in the background. These illustrations were suffered to reach the hands of the principal. Finally, as a culmination to this catalog of high crimes and misdemeanors, the teacher had on another occasion written to other teachers asking whether they objected to the effusions from an open burning incinerator in the middle of the playground. It was necessary for the teacher to involve a federal judge before she was able to get back her job. Downs v. Conway School District, 328 Fed Supp 338, (ED Ark, June 23, 1971). The court found that the superintendent demanded blind obedience to any directive he gave, whether illegal, arbitrary or capricious, and that he and the board should observe its own declared policy of permitting teachers to practice and illustrate democratic values in the classroom. Reinstatement with back pay and attorney fees were ordered. While incidents such as this do not always reach the light of day and make the law reports, I can assure you that Arkansas is not to be regarded as singularly benighted. In a state as sophisticated as Michigan I have encountered the same order of official cruelty, indifference and ignorance.

Since 1885 school boards and school administrators have by no means been purged of stupidity, cupidity and naked whim. The teacher who is unorthodox in appearance, radical in politics, or miscalculating in her methods of contraception is as likely to be victimized today as a generation ago. Something is sorely needed to take care of the caretakers of the educational system when the wine of authority goes to their heads. To the extent that tenure legislation provides a check upon arbitrary and irrational conduct of principals and superintendents and school board members, it continues to serve a salutary purpose.

It is true, of course, that the procedures provided in most tenure legislation are inadequate if not outright impermissible when judged by recent developments in constitutional and administrative law. School boards traditionally prefer charges or at least approve their institution by a principal or superintendent. The school board attorney usually assists in the framing of charges which vaguely explain that the teacher is guilty of conduct "unbecoming a teacher" or is being terminated for the "good of the system". The board then proceeds to act as the tribunal to try the truth of the charges, earnestly advised by the same school board attorney who alternatively serves as prosecutor and counsel to the board. If the teacher is represented by a lawyer at all, he is usually no match for an attorney operating in a familiar and congenial environment. Lay members of the board are respectfully guided concerning the admissibility of evidence and the procedures to be followed. If the teacher's attorney insists that procedural rules be strictly observed, he is cautioned

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These charades usually have little resemblance to what we regard as due process of law. The board has already made up its mind, or almost made up its mind, before the proceeding gets under way. To dismiss the charges means to repudiate the judgment of the superintendent, the board's hired hand, and to cast doubt upon his judgment as the head of the school system. All of this tends to corrupt the dispassion we have a right to expect from triers of fact. Pickering v. Board of Education, 391 US 563, 579 note (1968); cf. Tumey v. Ohio, 273 US 510 (1927); In re Munchinson, 349 US 133 (1955).

Some statutes permit suspension or termination of the teacher with a right to challenge the decision thereafter. This procedure runs contrary to the teaching of Goldberg v. Kelly, 397 US 254 (1970) which declared that benefits may not be constitutionally terminated by a government agency without notice and hearing in advance and not after the fact. Presumably, the right of a teacher to his job is no less substantial than the right of a welfare recipient to remain on the benefit rolls. See Recucci v. United States, 425 F2d 1252, 156-1257 (Ct. of Claims, 1970).

After a school board has decided that it was right all along, that the principal was right, and the assistant superintendent was right, and the superintendent was right, and the teacher has got to go, there is a chance to appeal to a board composed of people who are usually selected because they have no experience whatever in evaluating testimonial evidence. They are laymen asked to review the legality of the conduct of other laymen. For the most part they couldn't recognize an infringement of a teacher's constitutional rights if they saw it. In Michigan, at least, when a constitutional question is pointed out, they simply ignore it.

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Tenure acts are predicated upon the questionable premise

that it takes two years or three years or even five years to determine whether a teacher is a satisfactory public employee. Until the probationary period is completed the employee is lower than a serf, confined to professional Outer Mongolia. Thanks to the Ku Klux Klan Act of 1871, 42 USC § 1983, probationary teachers are slowly winning the right to be treated as citizens entitled to due process of law. As a response to this trend, more courts and state legislatures can be expected to write constitutional guarantees of fair treatment into tenure legislation. A recent decision of the Supreme Court of Michigan is a case in point. In Munro v. Elk Rapids Schools, 383 Mich 661 (1970) a probationary teacher was told that he would not receive a contract for the following year although he had satisfactorily served for two years. The board refused to give any explanation for this action. On original hearing the Court found no constitutional objection to this procedure and no violation of a statute designed to protect only those who had acquired tenure status. A strong dissent by Mr. Justice Thomas Giles Kavanagh indicated that the conduct of the board was contrary to the spirit and letter of legislation designed to protect teachers against capricious and arbitrary action. On rehearing, after a change of personnel of the Court.

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In another recent case, Jinks v. Mays, 3 FEP Cases 964 (ND Ga, 1971) the court held that a school board could not, consistent with the equal protection clause, deny maternity leave to probationary teachers while granting it to tenure teachers.

Such a distinction, the court reasoned, had no rational relationship to the purpose of tenure legislation.

Of course tenure acts rarely prevent dismissals for what our British cousins call "redundancy". Particular jobs may be discontinued, wholesale staff cuts may be made for budget reasons or because of program changes, and the resulting unemployment is deemed for good and sufficient reason, though without fault of the teacher. 100 ALR (2d) 1141 (1965). Plainly, a good collective agreement may better protect against these eventualities. In Warren Education Association and Warren Consolidated School District, AAA #5439 0661 70 (Harry N. Casselman, 1971) we recently persuaded a Michigan arbitrator to order repayment to some 170 teachers a total of more than \$93,000 representing lost compensation as a result of budget cuts.

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But in many states collective bargaining has barely begun in public education. In many more there has not yet emerged a widespread system of voluntary grievance arbitration which will protect new and older teachers alike from demotion or discharge without just cause. Even in Michigan we sometimes have contracts expire, strikes erupt and conditions develop during which no arbitration procedure is available. Accordingly, tenure acts do serve some purpose in reining in those who would otherwise ride over teachers' rights.

It is now fashionable among school board groups to pass resolutions urging the abolition of tenure statutes. The reason, it is said, is that they shelter the incompetent. I believe the greatest shelter of incompetent teachers is incompetent administrators. The trouble with educational supervisors is that they will not supervise. In Michigan we have to beg at the bargaining table for provisions that a probationary teacher should be looked in on at least twice a year in her classroom; principals prefer to

evaluate through extra-sensory perception without any observation, or by glancing through the window of the classroom while traveling the corridors. There is nothing about classroom teaching which defies reasonable evaluation if managers would take the time to look, to evaluate and to manage. In industry supervisors have learned that employees may not be fired unless they have been fairly and explicitly advised of what is expected of them, have been given reasonable opportunity to perform and have been admonished of their deficiencies and given a chance to remedy them. Progressive discipline is the rule, not the exception. In public education, however, administrators regard it as unseemly to tell a teacher how he is expected to teach, wherein he is failing to meet reasonable standards and how he can improve. Instead, they make furtive notes in a secret personnel file which is carefully screened from the teacher's view. When the teacher is finally discharged, these undirected

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Canvass the cases involving dismissals of teachers for alleged incompetency in the annotation in 4 ALR (3d) 1090 (1965). Rarely is a teacher accused of lack of knowledge of the subject

matter or inability to impart it to his pupils. The fact that students learn nothing during all the hours they are compelled by law to be in his classes is never cited as a ground for getting rid of him. Instead, school administrators are zealous to pounce upon the teacher who uses the magazine article with a four-letter word, Lucia v. Duggan, 303 Fed Supp 112, 118 (D Mass, 1969), or refuses to lead her class in a flag salute, Hanover v. Northrup, 325 Fed Supp 170 (D Conn, 1970). What is called a "failure to maintain discipline" is most usually regarded as the hallmark of incompetency; the pedagogue is frequently confounded with the jailer. Yet, a teacher can also be found incompetent because he is too much a martinet. Most of the criteria have even more subjective overtones. The teacher got married. Or she had a baby without being married. Or he was a parent of a child who was a delinquent.

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School boards and school administrators are infinitely less concerned about ridding schools of poor teachers than of protecting themselves against critical teachers or those who create public relations problems and disturb a bovine placidity in day-to-day routines. The clamor to abolish tenure acts in the name of "accountability" is in reality a campaign by school managers to avoid accountability themselves. To a modest degree tenure acts require them to stand up, to articulate their reasons for firing a teacher. Because their reasons are so frequently so inadequate, they are embarrassed by cross-examination and review.

They hate to see any outsider challenge their preconceptions and smug professional cliches. It is tough to have to explain yourself in words of one syllable, stripped of the protective mantle of the rhetoric of schools of education. But the right of a teacher to compel this explanation is a precious opportunity in a democratic society.

In some states it may still be true that tenure statutes can be construed to create a continuing contractual right of employment. The last time it considered the question, the Supreme Court indicated that repeal of the statute might impair the obligations of such contract and violate the constitution. Indiana ex rel. Anderson v. Brand, 303 US 95, reh. den., 303 US 667 (1938). The doctrine might still be serviceable before a court willing to heed the non-strict constructionism of John Marshall.

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But mostly I am against repeal of tenure acts because I oppose the die-hard philosophy which would throw the baby out with the bathwater. If the New York School Board Association and the Michigan Association of School Boards and all the other groups which are today united in chanting this siren song, were urging reform, improvement and revitalization of tenure legislation, theirs would be a more appealing presence. It might even be possible to take their criticisms of present law with some seriousness. But they are obviously out to destroy every semblance of legislative restraint upon the decisions of school authorities over the lives and livelihoods of teachers they employ. Their voracity has caught up with them. They propose no real alternative to existing legislation; they merely want to turn the clock back before 1885. The federal Constitution will not permit this. Neither, I trust, will the teachers nor legislators of the United States.